U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 19 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Michael Valdez

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a health care services firm. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA 750) with the Immigrant Petition for Alien Worker (I-140).

The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, as well as to pay the beneficiaries of other approved I-140 petitions filed by the petitioner, and denied the petition accordingly.

On appeal, counsel states that documentation submitted on appeal, including financial statements prepared on an accrual basis, establish the petitioner's ability to pay the proffered wage during the relevant period. Counsel also states that not all beneficiaries of the approved I-140 petitions submitted by the petitioner have in fact begun working with the petitioner.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

Employment-based petitions depend on priority dates. The priority date for Schedule A occupations is established when the I-140 is properly filed with CIS. 8 C.F.R § 204.5(d). The petition must be accompanied by the documents required by the particular section of the regulations under which it is submitted. 8 C.F.R. § 103.2(b)(1). The priority date of the petition in this case is March 28, 2003.

The proffered wage as stated on the Form ETA 750 is $25.00 per hour, which amounts to $52,000.00 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1990, to have a gross annual income of $2.1 million, and to currently have 140 employees.

In support of the petition, the petitioner submitted a copy of the beneficiary's Bachelor of Science in Nursing diploma granted May 31, 1994 by Unciano Colleges, Manila, Philippines, with the beneficiary's course transcript; a copy of the beneficiary's California registered nurse license card, with expiration date of June 30, 2004; a copy of the beneficiary's California registered nurse license, issued December 2, 2002; a partial copy of the petitioner's articles of incorporation; a copy of an informational flyer about the petitioner; a declaration on the financial capacity of the petitioner dated February 3, 2003 signed by the petitioner's chief executive officer and financial officer; and a copy of a certificate of a job announcement posting by the petitioner dated February 3, 2003, with attached job announcement.

The director found the evidence submitted to be insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, in a request for evidence (RFE) dated May 14, 2003 the director requested additional evidence pertinent to that ability. The director stated that he found the statement of financial capacity by the petitioner's chief financial officer insufficient on that issue. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted a letter dated May 29, 2003 and the following evidence: a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2002; a copy of the petitioner's Form 100 California Corporation Franchise of Income Tax Return for 2002; and a copy of the petitioner's California Form DE 6 Quarterly Wage and Withholding Report for the first quarter of 2003.

In a decision dated September 21, 2003, the director noted that CIS records indicated that three other I-140 petitions filed by the petitioner in the same year as the instant petition had already been approved. The director found that the petitioner's financial resources were sufficient to pay the proffered wages to the three beneficiaries of the previously-approved petitions, but that the evidence did not establish the petitioner's ability to pay additional employees. The director therefore denied the petition.

On appeal, counsel submits a brief and the following additional evidence: a letter dated September 24, 2003 from a certified public accountant explaining the petitioner's cash and accrual accounting methods; a balance sheet for the petitioner dated January 31, 2003, prepared on an accrual basis; a profit and loss statement of the petitioner for February through June 2003; a summary balance sheet of the petitioner dated June 30, 2003; a complete copy of the petitioner's articles of incorporation; copies of the petitioner's California Form DE 6 quarterly wage and withholding reports for the last quarter of 2002 and the first two quarters of 2003; a Statement by Domestic Stock Corporation of the petitioner, with due date of January 31, 2003; a list of real properties co-owned by the petitioner's managing director with purchase dates from 1994 through 2003, along with corresponding property deeds and title insurance documents; copies of sample records from 2002 and 2003 for thirteen employees of the petitioner showing for each record a time sheet, a payroll register, the petitioner's invoice to a hospital, and the check payment made by the hospital; copies of seven contracts of the petitioner, one with the U.S. Department of Veteran's Affairs, one with the Board of Supervisors, San Mateo County, California, and five with hospitals or other health care organizations; a copy of a transmittal memorandum for a card relating to a line of credit of the petitioner at an unidentified institution in the amount of $10,000.00; and a partial copy of a commercial loan statement dated September 1, 2003 showing a total line of credit amount of $100,000.00 with an unidentified institution, and with the information on the petitioner's current loan balance omitted.

Counsel states on appeal that documentation submitted on appeal, including financial statements prepared on an accrual basis, establish the petitioner's ability to pay the proffered wage during the relevant period. Counsel also

states that not all beneficiaries of the approved I-140 petitions submitted by the petitioner have in fact begun working with the petitioner.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

The I-140 petition states in Part 5 that the petitioner has 140 employees. The regulation at 8 C.F.R. § 204.5(g)(2), quoted in full above, states that "where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." Pursuant to this regulation, the petitioner submitted a declaration on the financial capacity of the petitioner dated February 3, 2003 signed by the petitioner's chief executive officer and financial officer. The text of the declaration states as follows:

> This is to certify that [the petitioner] is a private entity and its financial statements are not made available publicly. This is also to confirm that [the petitioner] has been in existence since 1990 and currently has more than 110 employees with an annual income of more than $2.1 million. It has more than sufficient financial capacity to pay for the wages of [the named beneficiary] who is the beneficiary of an I-140 petition by our company.

Although the regulation at 8 C.F.R. § 204.5(g)(2) allows CIS to accept a declaration by a financial officer of a petitioner, the regulation does not require CIS to defer to the opinion of any such financial officer. The regulation requires that any such statement be one "which establishes the prospective employer's ability to pay the proffered wage." The sentence in the regulation which allows for the submission of a statement by a financial officer of a petitioner therefore does not imply that every such statement must be deemed sufficient to establish a petitioner's ability to pay the proffered wage. Rather, the effect of that sentence in the regulation is to allow an additional form of acceptable evidence for any petitioner which has at least 100 employees, in addition to tax returns, annual reports, or audited financial statements, which are acceptable forms of evidence for all petitioners.

In the instant case, the statement by the petitioner's chief executive officer and financial officer lacks detailed financial information indicating the basis for the conclusion that the petitioner has the ability to pay the proffered wage to the beneficiary. Moreover, the statement makes no reference to other I-140 petitions filed by the petitioner. As discussed in more detail below, CIS records show that the petitioner has filed numerous I-140 petitions in recent years. The statement by the petitioner's chief executive officer and financial officer fails to consider the issue of the petitioner's ability to pay the proffered wage to the beneficiary in the instant petition while also paying the proffered wages to the beneficiaries of the other petitions filed by the petitioner. For these reasons, the statement fails to establish the petitioner's ability to pay the proffered wage to the beneficiary during the relevant time period.

In determining the petitioner's ability to pay the proffered wage CIS will also examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage.

Although the ETA 750B signed by the beneficiary on February 13, 2003 did not state any work experience with the petitioner as of that date, the record before the director contained evidence that the beneficiary was employed by the petitioner during at least a portion of the first quarter of 2003. The petitioner's California Form DE 6 shows that during that quarter the beneficiary received $3,790.00 from the petitioner. The record

does not indicate when the beneficiary began working for the petitioner, so it is not possible to determine whether the beneficiary was paid the proffered wage during the portion of that quarter when he worked for the petitioner. The record before the director lacked any further evidence on compensation paid by the petitioner to the beneficiary. Therefore the evidence concerning the beneficiary's employment by the petitioner does not establish the petitioner's ability to pay the proffered wage.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax return for 2002 shows the amount for taxable income on line 28 as $183,708.00. That amount is greater than the proffered wage of $52,000.00.

As an alternative means of evaluating the petitioner's ability to pay the proffered wages, CIS may also review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Concerning the instant petition, calculations based on the Schedule L's attached to the petitioner's tax return for 2002 yield the figure of -$7,465.00 for net current assets for the end of 2002. Since that figure is negative, it provides no further evidence in support of the petitioner's ability to pay the proffered wage.

The record before the director closed with the submission of counsel's letter dated May 29, 2003 with accompanying evidence in response to the RFE. At that time the petitioner's 2002 return was its most recent return available. If the instant petition were the only one filed by the petitioner, the petitioner's taxable income of $183.708.00 on line 28 of its 2002 return therefore would be sufficient to establish its ability to pay the proffered wage during the relevant period. However, CIS records indicate that the petitioner has filed multiple I-140 petitions since 1998.

CIS records indicate that the numbers of I-140 petitions filed by the petitioner each year since 1998 are as follows: one in 1998, one in 1999, one in 2000, seven in 2001, thirty-one in 2002, seventeen in 2003 (including

the instant petition), and two in 2004. The ten petitions filed from 1998 to 2001 were all approved. Of the thirty-one petitions filed in 2002, fifteen were approved; of the seventeen filed in 2003, five were approved; and of the two filed in 2004, none have been approved. Of the petitions which have not been approved, four are still pending the director's decision and the rest were either denied or had prior approvals revoked. For some of the denied petitions, appeals are now pending with the AAO.

Where a petitioner has filed petitions for multiple beneficiaries, it is the petitioner's burden to establish its ability to pay the proffered wage to each of the potential beneficiaries. In the instant petition, although the evidence indicates financial resources of the petitioner greater than the beneficiary's proffered wage, the evidence does not contain information about the multiple I-140 petitions filed by the petitioner. Specifically, the record in the instant case lacks information about wages paid to other potential beneficiaries of I-140 petitions filed by the petitioner, about the priority dates of those petitions, and about the present employment status of those other potential beneficiaries. Lacking such information, the evidence submitted prior to the director's decision fails to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition.

In his decision, the director correctly stated the petitioner's taxable income before net operating loss and special deduction on its 2002 return as $183,708.00. The director stated the figure of $7,465.00 as the petitioner's net current assets for 2002, but the director apparently omitted the minus sign for that figure, since a calculation of the petitioner's year-end net current assets for 2002 yields the negative figure of -$7,465.00. Nonetheless, that error did not materially affect the director's analysis.

The director noted that CIS records indicated that three other I-140 petitions filed by the petitioner in the same year as the instant petition had already been approved. The director found that the petitioner's financial resources were sufficient to pay the proffered wages to the three beneficiaries of the previously-approved petitions, but that the evidence did not establish the petitioner's ability to pay additional employees. No information on the proffered wages paid to those three beneficiaries appears in the record in the instant case, nor does the director's decision state what figures the director used in concluding that the evidence in the instant case established the petitioner's ability to pay the proffered wages to those three beneficiaries. Presumably, the director had access to the files containing those other petitions when he analyzed the evidence in the instant petition.

Although the record in the instant petition does not show the basis for the director's calculations pertaining to the proffered wages for beneficiaries of other petitions filed by the petitioner, the director's decision to deny the instant petition was correct. Although the director referred to only three other petitions submitted by the petitioner, in fact, as discussed above, the petitioner has filed numerous I-140 petitions, including 17 petitions filed in 2003, the year in which the priority date was established. In the instant petition, the petitioner did not submit evidence to show its ability to pay the beneficiaries of other approved and pending petitions while also paying the proffered wage to the beneficiary in the instant petition. The director's decision to deny the petition was therefore correct, based on the evidence submitted prior to the director's decision.

On appeal, counsel submits a brief and additional evidence. Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

> Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence

submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the evidence submitted on appeal relates to the petitioner's ability to pay the proffered wage. The petitioner was put on notice of the need for evidence on this issue by the regulation at 8 C.F.R. § 204.5(g)(2) which is quoted on page two above. In addition to the regulation, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the AAO and its predecessor agencies. Moreover, in the instant case, the petitioner was put on notice by the RFE issued by the director of the need for evidence relevant to the petitioner's ability to pay the proffered wage. For the foregoing reasons, the evidence submitted for the first time on appeal is precluded from consideration by *Matter of Soriano*, 19 I & N Dec. 764.

Nonetheless, even if the evidence submitted for the first time on appeal were properly before the AAO, it would fail to overcome the decision of the director. The petitioner's evidence submitted on appeal includes a letter dated September 24, 2003 from a certified public accountant explaining the petitioner's cash and accrual accounting methods and purposes. That letter states that the petitioner uses a cash basis in its tax returns, because the petitioner is a service company. Companies which sell products and therefore have inventories are required to file taxes on an accrual basis, according to the letter. The letter states that for internal purposes the petitioner maintains its accounting records on an accrual basis, a method which generally presents a more stable picture of a company's financial situation from year to year, according to the letter.

Also submitted on appeal is a balance sheet for the petitioner as of January 31, 2003, prepared on an accrual basis. Although the balance sheet appears immediately below the accountant's letter in the exhibits submitted on appeal, the accountant's letter speaks in only general terms about the accounting methods followed by the petitioner, and makes no reference to the balance sheet for January 31, 2003. The balance sheet therefore appears to be an unaudited financial statement. Similarly, the petitioner's other financial statements submitted on appeal, namely a profit and loss statement for the period February through June 2003, and a summary balance sheet dated June 30, 2003, bear no indications that they are audited financial statements.

Unaudited financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Counsel also submits on appeal copies of seven contracts of the petitioner, one with the U.S. Department of Veteran's Affairs, one with the Board of Supervisors, San Mateo County, California, and five with hospitals or other health care organizations; and copies of sample records from 2002 and 2003 for thirteen employees of the petitioner showing for each record a time sheet, a payroll register, the petitioner's invoice to a hospital; and a check payment made by the hospital. Those documents provide detailed information on the manner in which the petitioner conducts its business, and they are persuasive evidence that the petitioner earns significant income for each of its employees who are placed in health care facilities pursuant to one of the contracts with the petitioner. However, the voluminous evidence submitted on appeal lacks any evidence relating the petitioner's present business operations and present employee payroll records to its ability to pay additional employees hired pursuant to approved and pending I-140 petitions.

The contracts in evidence contain detailed information on petitioner's charges to each contracting health care facility for nurses in various specialties and working various shifts. The contracts also contain detailed

descriptions of the duties of the nurses to be provided by the petitioner. But none of the contracts obligate any health care facility to request any minimum amount of nursing services from the petitioner, nor do they obligate the petitioner to fulfill all requests. For example, the contract between the petitioner and the Veteran's Administration states, "[t]his is an indefinite-quantity contract for the supplies or services specified in the [attached] Schedule," and states that "[t]he quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract." (Petitioner's Exhibit 20, page 78). Similarly, a contract with one of the private health care facilities commits the petitioner to supply registered nurses "upon request" by that health care facility. (Petitioner's Exhibit 22, section 2.) Moreover, the petitioner's obligation to provide nurses in response to any such request is "subject to the availability of qualified nurses." (Petitioner's Exhibit 22, section 2.)

Counsel also submits on appeal copies of the petitioner's California Form DE 6 quarterly wage and withholding reports for the last quarter of 2002 and the first two quarters of 2003. Counsel asserts that those reports show an increasing trend. The reports show total subject wages of $477,618.65 in the fourth quarter of 2002, $614,132.48 in the first quarter of 2003, and $771,876.04 in the second quarter of 2003.

Counsel also submits a copy of a transmittal memorandum for a card relating to a line of credit of the petitioner at an unidentified institution in the amount of $10,000.00 and a partial copy of a commercial loan statement dated September 1, 2003 showing a total line of credit amount of $100,000.00 with an unidentified institution, and with the information on the petitioner's current loan balance omitted. Those documents fail to indicate how much of lines of credit have been used by the petitioner, therefore they fail to show any additional financial resources available to the petitioner.

The record also includes a list of real properties co-owned by the petitioner's managing director with purchase dates from 1994 through 2003, with corresponding property deeds and title insurance documents. Counsel's brief identifies the managing director and her co-owner, who both have the same last name, as the "sole stockholders" of the petitioner. (Brief, page 3). But counsel's assertion on this point is not supported by any documentary evidence in the record. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel states that the relevance of the property deeds of the petitioner's stockholders is to show their ability to repay loans to shareholders, shown on the balance sheet of the petitioner's tax return for 2002. Counsel asserts that since the stockholders had sufficient assets, they could have repaid the loans at any time, and that therefore those loans should be considered as current assets of the corporation. However, it is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Despite the extensive documentation submitted on appeal, the evidence lacks any audited financial statements, and lacks any information concerning the prospective new employees of the petitioner as a result of its approved and pending I-140 petitions. Counsel asserts that many beneficiaries of I-140 petitions who are still in their home countries do not necessarily seek immigrant visas based on those approved I-140 petitions because they may be the beneficiaries of multiple petitions from different petitioners. Moreover, even after beginning employment many such beneficiaries may accept offers from other employers and leave the employment of the petitioner who had filed the I-140 petition on their behalf. Counsel cites the portability provision of the American Competitiveness Act for the 21st Century to note that an alien who has had an adjustment of status petition

pending for more than six months is permitted to switch employers and still adjust status based on a previously-approved petition submitted by the alien's earlier employer.

As noted above, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Moreover, even if counsel's assertions about the general nature of the employment-based immigrant visa process were assumed to be true, the record in the instant case would still lack evidence to show that the specific beneficiaries of the multiple I-140 petitions filed by the petitioner have failed to seek immigrant visas based on approved petitions or for other reasons are no longer expected to be in the employ of the petitioner. Nor does the record in the instant petition contain any information about the proffered wages for the beneficiaries of other petitions filed by the petitioner. Therefore the record lacks a basis for evaluating the petitioner's ability to pay the additional employees on whose behalf it has filed petitions.

For the foregoing reasons, the evidence submitted on appeal would fail to overcome the decision of the director, even if that evidence were properly before the AAO on appeal.

Beyond the decision of the director, the record lacks enough information to determine if the notice of job availability announcing the offered position complies with 20 C.F.R. § 656.20(g)(8), since the petitioner has not submitted evidence that it is offering a prevailing wage rate for a specific geographic location where the proffered position would be performed. The regulation at 20 C.F.R. § 656.20(g)(8) states the following: "If an application is filed under the Schedule A procedures at Sec. 656.22 of this part, the notice shall contain a description of the job and rate of pay, and the requirements of paragraphs (g)(3) (ii) and (iii) of this section." In addition, since the petitioner has failed to identify the location where the work will be performed and since the petitioner's intention is to contract the beneficiary to a third-party client's facility, the notice cannot conform to the regulatory requirements under 20 C.F.R. § 656.20. Under the regulations, the notice must be posted at the facility or location of the beneficiary's employment. Because the petitioner failed to identify the actual "facility or location of the employment," the petitioner cannot establish that it has complied with the notice requirements at 20 C.F.R. § 656.20(g)(1), (g)(3), or (g)(8). The posting certificate dated February 3, 2003 indicates that the job announcement for the offered position was posted at the petitioner's administrative offices. But by merely posting the notice at its administrative office, the petitioner has not complied with the regulatory notice requirements. The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. *See* Immigration Act of 1990, Pub.L. No. 101-649, 122(b)(1), 1990 Stat. 358 (1990); *see also* Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991). The petitioner further failed to indicate whether it provided notice to the appropriate bargaining representative(s). Given that the appeal will be dismissed for the petitioner's failure to establish its ability to pay the proffered wage, this issue need not be discussed further.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.